



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 7 OF 2017**

**THE BOARD OF TRUSTEES GREAT LAKES UNIVERSITY OF KISUMU .....**  
**..... 1<sup>ST</sup> PLAINTIFF**

**GREAT LAKES UNIVERSITY OF KISUMU STUDENTS' ORGANISATION .....**  
**..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE CHAIRPERSON, GOVERNING COUNCIL GREAT LAKES UNIVERSITY OF KISUMU**  
**..... 1<sup>ST</sup> DEFENDANT**

**THE GOVERNING COUNCIL GREAT LAKES UNIVERSITY OF KISUMU .....**  
**..... 2<sup>ND</sup> DEFENDANT**

**REV. PROFESSOR DAVID KODIA .....**  
**3<sup>RD</sup> DEFENDANT**

**BISHOP JAMES OCHIEL .....**  
**4<sup>TH</sup> DEFENDANT**

**BY WAY OF COUNTERCLAIM**

**GREAT LAKES UNIVERSITY OF KISUMU .....**  
**..... PLAINTIFF**

**VERSUS**

**RT. REV. DR. FRANCIS MWAYI ABIERO .....**  
**..... 1<sup>ST</sup> DEFENDANT**

**PROF. RICHARD MUGA .....**  
**2<sup>ND</sup> DEFENDANT**

**PROF. ATIENO ANNE NDEDE AMADI .....**  
**3<sup>RD</sup> DEFENDANT**

**RULING**

By the Notice of Motion dated 3<sup>rd</sup> April 2017 the Plaintiff in the counter claim seeks orders that –

1. “(Spent)

2. (Spent)

3. THAT while pending the hearing and final determination of this suit an Order of Temporary Injunction do issue restraining the Defendants to the Counterclaim and the 2<sup>nd</sup> Plaintiff in the original suit, jointly and severally, whether by themselves, their agents or servants from howsoever, interfering or continuing to interfere with the affairs of and the peaceful operations of the Plaintiff University, or its smooth operations or otherwise continuing to transact any business in the name of the Plaintiff University or otherwise acting as agents or employees of the said University, whether as Trustees, or Vice Chancellor or both, or in any capacity at all.

4. THAT while pending the hearing and final determination of this application and the suit an order of mandatory injunction do issue directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the Counter claim to revoke their joint letter dated 22.3.2017 addressed to all Banks and the partners of the University, and

5. or any other letter, if any, which they have written to any Banks or partners of the Plaintiff University, stopping such recipients of such letters from dealing or transacting with the newly appointed officers of the University in replacement of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their roles at the University.”

The application is premised on grounds that –

“(a) The operations of the Plaintiff in the Counterclaim, has ground to a halt and the University closed without any chance of being re-opened on account of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ actions of interference with the operations of the University by purporting to continue representing themselves as members of Board of Trustees of the University despite their appointment as Trustees having been lawfully revoked by the appointing authority namely the Sponsor of the University and despite the 3<sup>rd</sup> Defendant having been dismissed from employment as Vice Chancellor of the University.

(b) On the strength of letters written by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the University’s Bankers, despite having had their appointment as such Trustees revoked, and despite the 3<sup>rd</sup> Defendant’s dismissal from employment, the University’s Bankers have declined to allow the new proposed signatories to the Bank accounts to replace the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and thus denied the University access to the funds in those accounts rendering it impossible for the University to meet its obligations of paying salaries for March 2017 to all its employees, undertake any of its academic programs which all require financial facilitation, and service its existing loans, which has posed a risk to the securities of the University held with the Banks.

(c) The Defendants’ foregoing actions are acts of trespass and are without any legal justification whatsoever, having ceased to be agents of the University in their respective capacities in which they operated those bank accounts.

(d) The Defendants to the Counterclaim having all lodged suits in court seeking redress, it would be convenient and in the interest of justice to allow the University operations run peacefully to cater for the interests of those employees and students whose education has come to a standstill yet they have no interest in the present litigation, by issuing orders sought herein immediately.

(e) Unless the 2<sup>nd</sup> Plaintiff in this suit, as read with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the Counterclaim, are restrained by this court, immediately, they are likely to continue

**disrupting the proper and peaceful operations of the University, hence the instant suit by Counterclaim and application for Temporary Injunction while pending the outcome of the suit.”**

The application is opposed vide a replying affidavit sworn by Prof. Atieno Anne Ndede Amadi the 3<sup>rd</sup> Defendant/Respondent in the counterclaim. She deposes inter alia that the counterclaim is a nullity ab initio as it is filed by a party who was not a defendant in the suit, that the dispute between her and the plaintiff in the counterclaim is one of employment which is the exclusive preserve of the Employment and Labour Relations Court by dint of Article 162(2)(a) of the Constitution and that therefore this court has no jurisdiction to entertain it; that the main suit by among others the 2<sup>nd</sup> Plaintiff having been withdrawn the orders sought against it in the application are incapable of being granted and further that she was lawfully reinstated as the Vice Chancellor by Great Lakes University of Kisumu Board of Trustees vide their letter dated 27<sup>th</sup> March 2017. She also deposes that following her reinstatement she chaired a Senate Meeting on 7<sup>th</sup> April 2017 where it was resolved that the University re-open on 19<sup>th</sup> April 2017 subject to ratification by the Governing Council. That the said Governing Council met on 14<sup>th</sup> April 2017 and ratified the decision of the senate to re-open the University and recall the students. She also deposes that since the re-opening normal University operations and programmes have been ongoing and there have been no chaos or riots by students or workers. She deposes that granting the application for injunction will not achieve the much desired tranquility that the University craves but will instead plunge the University into chaos as the students having paid fees and now being taught will no doubt protest against any closure. She contends that the balance of convenience militates against closure of the University and in view of the foregoing the applicant has not made a case to warrant the grant of the orders sought.

In reply to this affidavit the plaintiff/applicant filed two further affidavits sworn by one Dr. Linda Musumba the Chairperson of Governing Council of the Great Lakes University in which she deposes, inter alia, that the counterclaim was filed on behalf of the Governing Council in the name of the University; that the counterclaim having been filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in the original suit it is properly before the court. She reiterates that the 3<sup>rd</sup> Defendant/Respondent was properly dismissed as the Vice Chancellor and as such she has no capacity to transact the affairs of the University.

On their part the Defendants in the counterclaim filed a Notice of Motion dated 21<sup>st</sup> May 2017 in which they seeks orders that –

1. **“(Spent)**
2. **THAT pending the hearing and determination of this application, there be an order of stay of further proceedings herein.**
3. **THAT the counterclaim lodged by the Respondent – Great Lakes University of Kisumu – be excluded and/or struck out with costs to the respondent.**
4. **THAT costs of this application be granted.”**

The grounds for that application are that –

1. **“THAT Great Lakes University of Kisumu, the plaintiff in the counterclaim, is not a defendant/or party to the original suit.**
2. **THAT the original suit had the Governing Council of Great Lakes University of Kisumu as party.**
3. **THAT the respondent not being a defendant as contemplated by Order 1 Rule 7 of the Civil Procedure Rules 2010, cannot properly originate a counterclaim.**

**4. THAT the counterclaim, as lodged, constitutes an abuse of the court process and ought to be lodged as a separate and distinct suit.**

**5. THAT the pleadings and/or suit shall be duded up in a manner prejudiced to the defendants to the counterclaim and the applicants herein as well as embarrassing the courts should they desire to raise counterclaims within a counterclaim.**

**6. THAT the grant of the orders sought shall be in the interest of justice.”**

The application is supported by the affidavit of Prof. Atieno Anne Ndede Amadi – the 3<sup>rd</sup> Defendant in the counterclaim. She deposes inter alia that the Plaintiff in the counterclaim having not been sued in the original suit and having not been enjoined either by the original plaintiff or by an order of the court as a defendant the counterclaim is a nullity and should be struck out for being an abuse of the court process. She deposes that this is a proper case for exclusion of the counterclaim and an order directing the plaintiff to institute a separate and proper suit be made.

This court directed that the two applications be heard together by way of written submissions. This court received submissions from both sides and set the date for ruling as 28<sup>th</sup> September 2017 and again on 12<sup>th</sup> October when it could not deliver due to pressure of work. The delay is regretted.

There are two issues for determination –

**1. Whether the counterclaim upon which the application by Great Lakes University dated 3<sup>rd</sup> April 2017 is anchored is competent.**

**2. Whether the two applications filed by the parties have merit. Whether the applicant in the Notice of Motion dated 3<sup>rd</sup> April 2017 has established sufficient grounds for grant of the orders sought.**

The background to this dispute is that on or about 19<sup>th</sup> December 2016 the 1<sup>st</sup> Defendant in the original suit convened a meeting of the Governing Council of the Great Lakes University of Kisumu (the 2<sup>nd</sup> Defendant) to be held on 29<sup>th</sup> December 2016. The 3<sup>rd</sup> Defendant (Vice Chancellor) did not attend the meeting as a result of which the Defendants issued her with a show cause letter dated 4<sup>th</sup> January 2017 and subsequently dismissed her. On 31<sup>st</sup> January 2017 the Board of Trustees (the 1<sup>st</sup> Plaintiff in the suit) held a meeting to discuss the issue and invited the 1<sup>st</sup> and 2<sup>nd</sup> Defendants but they declined to attend. The 1<sup>st</sup> Plaintiff met and descinded the decision of the Defendants to suspect the Vice Chancellor (3<sup>rd</sup> Defendant in the counterclaim). In the meantime the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had put in place a new team to run the affairs of the University a decision which the Board of Trustees (1<sup>st</sup> Plaintiff) considered irregular and which it purported to resolve by dissolving the Governing Council (2<sup>nd</sup> Defendant in counterclaim). It thereafter resolved to constitute a new Governing Council thereby rendering the 2<sup>nd</sup> Defendant non-existent. Thereafter some of the members of the Board of Trustees were themselves removed by the General Assembly (sponsor of the University). The parties then came to court seeking a resolution of the dispute.

The 3<sup>rd</sup> Defendant early enough recognizing that her dismissal was not within the jurisdiction of this court took her dispute to the Employment & Labour Relations Court. In my view the real controversy between the parties is not whether or not the 3<sup>rd</sup> Defendant's dismissal was lawful but rather which of the organs of the University – the Board of Trustees, the Governing Council, the Founders thereof is responsible for governance and management of the University more so the discipline of its staff and more especially the Vice Chancellor. The organs of the University are wrangling as to which of them has the upper hand in the management of the University and to say that this is simply a matter of employer/employee is with due respect to be simplistic.

That notwithstanding I do agree with Counsel for the Defendants/Respondents that the Notice of Motion dated 3<sup>rd</sup> April 2017 is incompetent. As correctly submitted by Counsel for the Respondents none of the parties in the counterclaim were parties in the original suit. Whereas Order 7 rule 8 of the Civil Procedure Rules recognizes that a person(s) other than the Plaintiff can be brought into a counterclaim Order 7 rule 3 envisages that only a Defendant in the suit can bring a counterclaim. The rule states –

**“3. A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”**

The Defendant in the original suit was not the Great Lakes University of Kisumu but the Chairperson of the Governing Council and the Council itself. My view is that these are all different and distinct entities. Under Section 3(2) of the Charter for the Great Lakes University of Kisumu the University is a body corporate with perpetual succession and a common seal and capable of suing and being sued. It does not require the Governing Council to sue on its behalf. The Chairperson and the Governing Council have their own functions and suing on behalf of the University is not among them unless of course there be a resolution for them to do so which is not the case here. As a counterclaim can only be brought by a defendant in the suit (see Order 7 rule 3 of the Civil Procedure Rules above) and the Plaintiff in the counterclaim not being a defendant in the suit the application by the defendants/Respondents to exclude the same has merit. The counterclaim is therefore struck out and/or excluded but the Plaintiff/Applicant shall be at liberty to file an independent suit.

On the merits it is my finding that the application would not have succeeded. This is given that the applicant has not demonstrated that by allowing the operations of the University to continue it is likely to suffer damage that cannot be compensated by an award of damages. Moreover I agree with the submission by Counsel for the Respondents that the balance of convenience tilts in favour of allowing the operations of the University to continue even as the various organs of the University try to look for a solution to the wrangles pitting each against the other. The students who are not part of these wrangles are the ones likely to suffer most if the orders sought are granted. In any event there are enough institutions to guard against plunder of the resources and property of the University and this ought therefore not to be a reason to paralyse its operations. Any abuse of the University property or any impropriety on the part of the officials should be promptly reported to the authorities charged with law enforcement. Accordingly the application by the Plaintiff/Applicant is dismissed and that of the Defendants/Respondents is allowed. However given the circumstances of this case I shall order that each party bear its own costs.

It is so ordered.

**Signed, dated and delivered at Kisumu this 18<sup>th</sup> day of October 2017**

**E. N. MAINA**

**JUDGE**

**In the presence of:-**

Mr. Ragot for the Plaintiff/Applicant

Mr. Gesicho for the Defendants/Respondents (H/B for Mr. Okong’o Advocate)

Serah Sidera - Court Assistant